IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No.89 of 2002

For Approval and Signature:

HONOURABLE MR.JUSTICE J.M.PANCHAL
AND
HONOURABLE MR.JUSTICE H.B.ANTANI

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1 Whether Reporters of Local Papers may be allowed to see the judgment?

2 To be referred to the Reporter or not?

3 Whether their Lordships wish to see the fair copy of the judgment?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder?

5 Whether it is to be circulated to the Civil Judge?

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MOHEMMAD IQBAL YAKUBJI CHHIPA & ORS.- Appellants

Versus

STATE OF GUJARAT - Respondent

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Appearance :
MR MJ BUDDHBHATTI for Appellants.
MR ND GOHIL, APP for Respondent.
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CORAM : HONOURABLE MR.JUSTICE J.M.PANCHAL
and
HONOURABLE MR.JUSTICE H.B.ANTANI

Date : 26/09/2005

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE J.M.PANCHAL)

Instant appeal filed under Section 374(2) of the Code of Criminal Procedure, 1973, is directed against judgment dated January 10, 2002 rendered by the learned Special Judge & Additional Sessions Judge, Bharuch, in Special N.D.P.S. Case Nos.6 of 1998 and 12 of 1998 by

which the five appellants are convicted under Section 21 read with Section 29 of the Narcotic Drugs & Psychotropic Substances Act, 1985 (“the Act” for short), and each sentenced to R.I. for fifteen years and fine of Rs.1 Lac, in default R.I. for one year.

2. The short facts emerging from the record of the case are as under:

Mr.J.D.Ramgadhiya, who was serving as Police Inspector in Unit No.IV of A.T.S., Ahmedabad, received a secret information at 3.30 PM on March 9, 1998 that four persons namely; (1) Iqbal Chhipa; (2) Pappu Dhobi; (3) Bhaskar Rajan; and, (4) Ramesh Dhobi, were going to deliver brown sugar to Malaiya Rajan Gaupati behind Bharuch Railway Police Station, near Sheetal Guest House, Bharuch. In the secret information, description of the dresses put on by the abovenamed four persons was also given. Mr.Ramgadhiya conveyed the secret information received by him to Mr.Shaikiya, who was his immediate official superior. He with his staff in the company of Mr.D.A.Patel, who was Police Inspector, Unit No.I, A.T.S. Ahmedabad, came to Bharuch in Government Vehicle bearing registration No.GJ-1-G-3136. Mr.Ramgadhiya conveyed the information received by him to Mr.Kiritsinh Jhala, who was then Police Inspector, “A” Division, Police Station,

Bharuch in writing, and requested him to assist in the raid. Police Inspector Mr.Jhala asked Constable Karshanbhai to summon panch-witnesses and also asked Police Constable Viththalbhai to summon a person to weigh the substance if ultimately it was found from the possession of the persons named in the secret information. On arrival of panch-witnesses, their willingness to act as panch-witnesses was ascertained and first part of the panchnama was drawn at the Police Station. A photographer was also summoned to picturize as to what was happening during the raid. The members of the raiding party including panchas, photographer, and the person, who was summoned to weigh the substances, proceeded towards the spot indicated in the information in two vehicles from Bharuch Police Station. The vehicles were parked near Bharuch Railway Police Station. After alighting from the vehicles, the members of the raiding party reached the place near Sheetal Guest House on foot and took their position behind luxury buses to keep vigil about suspicious activities of the persons, who were named in the secret information. At about 12.20 hours, one person was sighted coming from the side of Railway over-bridge. He stood near fence of Sheetal Guest House. After sometime, four persons came on foot from the side of College Road. They reached near Sheetal Guest House and shook hands with the person who was already standing

near the fence of the guest house. Therefore, the four persons started talking with the person who had come from the side of Railway over-bridge. As the four persons, who had come from the side of the College Road, answered the description given in the secret information, the members of the raiding party cordoned them. The Police Inspectors introduced themselves to the five persons and informed them about the receipt of the information by Mr.Ramgadhiya. The five persons were informed by the Police Officers that it was necessary to search their persons and offered them to be searched in presence of a gazetted officer or a magistrate, if they so desired. However, offer made by the Police Officers was declined by the five persons. On interrogation, the five persons disclosed their names; i.e. (1) Mohmed Iqbal Yakubji Chhipa, who is appellant No.1 herein; (2) Pappu Mohanlalji Dhobi, who is appellant No.2 herein; (3) Bhaskar Gangarajan Pangutee, who is appellant No.3 herein; (4) Rameshbhai Sunderlal Dhobi, who is appellant No.4 herein; and (5) Malaiya Rajan Gaupati, who is appellant No.5 herein. It was found that the appellant No.1 was carrying a cloth bag in his hand and on search, it was found to be containing a plastic bag. The plastic bag was opened and it was found that substance kept in the plastic bag was brown sugar. On search of person of the appellant No.1, a black coloured wallet, two keys,

railway ticket from Ratlam to Vadodara whereas another railway ticket and receipt dated March 9, 1998 issued by Tourist Section of Vadodara Municipal Corporation, one telephone diary, and Rs.32=00 in cash, were found. The search of person of the appellant No.2 resulted into find of plastic bag containing brown sugar and Rs.500=00 in cash whereas search of person of the appellant No.3 resulted into find of a plastic bag and Rs.120=00 in cash. Further, railway ticket from Borivalli to Ratlam and identification card were also recovered from the person of the appellant No.3. The search of person of the appellant No.4 resulted into find of cash of Rs.100=00 whereas the search of appellant No.5 resulted into find of cash of Rs.100=00. It may be stated that the members of the raiding party had carried with them a testing-kit also with other materials such as sealing wax, seal, etc. The Police Officer demanded pass or permit authorizing the appellants to possess brown sugar, but no pass or permit could be produced. It is worth noticing that the place where brown sugar was found from the possession of the appellants, was dark and it was not possible to weigh the substance or draw samples. Therefore, the appellants were taken to Sheetal Guest House. There, Room No.110 was booked and seized substance was subjected to preliminary test, which was carried out by Mr.Dodiya, and it was found that powder kept in plastic bags found from

possession of the appellant Nos.1 to 3 was brown sugar. Vimalbhai Kantilal Jain, who was summoned to weigh the substance, weighed the same on electronic digital scale. The substance seized from the possession of the appellant No.1 weighed 493 gms. 500 mgms. whereas the substance found from the possession of the appellant No.2 weighed 555 gms. and the substance found from the possession of the appellant No.3 weighed 540 gms. Thereafter, three separate samples from each bag were drawn and sealed as required by law after which, second part of panchnama was concluded at Sheetal Guest House. PI Mr.D.A.Patel reduced into writing his complaint at Sheetal Guest House. It was forwarded to “A” Division Police Station, Bharuch, for registration of offences. In order to ascertain nature of substance found from possession of the appellants, an expert from F.S.L. was summoned at the Police Station. On arrival of expert of the F.S.L., one sealed sample out of three sealed samples drawn from each bag was opened and analyzed. The report of the expert, *prima facie,* indicated that the substance analyzed was brown sugar. The complaint of Mr.Patel was handed over to Mr.Dodiya for investigation, who retained samples with him after informing the learned Chief Judicial Magistrate, Bharuch. During the course of investigation, the Investigating Agency arrested Meerbazkhan Iradkhan Pathan. On completion of investigation, the five appellants along

with Meerbazkhan Iradkhan Pathan, were chargesheeted in the Court of learned Special Judge, Bharuch. On the basis of the chargesheet, Special N.D.P.S. Case No.6 of 1998 was registered. Further, the investigation revealed that Chandu @ Chandrashekhar Dharamchand Bhatevara had brought brown sugar in his ambassador car from Rajsthan to Baroda and handed over quantity of brown sugar to the appellant No.2. It was revealed that as a part of conspiracy, the appellant Nos.1 to 4 were to hand over brown sugar to the appellant No.5 who ultimately was to take the same at Bombay. Therefore, accused Chandu was also booked for commission of offence punishable under the Act. He could not be arrested before Special N.D.P.S. Case No.6 of 1998 was registered. However, subsequently, he was also arrested and on the basis of chargesheet submitted against him, Special N.D.P.S. Case No.12 of 1998 was registered.

3. The learned Special Judge to whom Special N.D.P.S. Case No.6 of 1998 was made over for trial framed necessary charge against the appellants and Meerbazkhan Iradkhan Pathan at Exh.12. It was read over and explained to them. They pleaded not guilty to the same and claimed to be tried. In Special N.D.P.S. Case No.12 of 1998, the charge against Chandu @ Chandrashekhar Bhatevara was framed at Exh.4. It was also read over and explained to

him. He also pleaded not guilty to the same and claimed to be tried.

As both the cases were arising from the same transaction, they were consolidated on the request of the learned advocates of the parties.

4. In order to prove its case, the prosecution examined; (1)panch Yogeshkumar Kanaiyalal Pandya as P.W.-1 at Exh.23; (2) panch Rameshchandra Pyarelal Agrawal as P.W.-2 at Exh.32; (3) panch Natwarbhai Behchar Jadav as P.W.-3 at Exh.33; (4) panch Abdul Harif Abdul Majeed Shaikh as P.W.-4 at Exh.39; (5) panch Hajarkhan Zarinkhan Pathan as P.W.-5 at Exh.51; (6) panch Narendrasinh Khumansinh Chauhan as P.W.-6 at Exh.53; (7) panch Thakoreprasad Jadeeshlalji Khatri as P.W.-7 at Exh.54; (8) panch Umashanker Mohanlalji as P.W.-8 at Exh.56; (9) Vimalkumar Kantilal Jain as P.W.-9 at Exh.59; (10) Pragnesh Hasmukhlal Soni as P.W.-10 at Exh.60; (11) Surendralal Harilal Shukla as P.W.-11 at Exh.62; (12) owner of STD-PCO Nizamuddin Yusuf Patel as P.W.-12 at Exh.65; (13) owner of Rambharose Hindu Hotel & Boarding House Dhirajlal Amrutlal as P.W.-13 at Exh.67; (14) owner of Gallord Pan-Shop Jitendrabhai Dahyabhai as P.W.-14 at Exh.71; (15) owner of Mayank Hotel Murtujabhai Abbasbhai as P.W.-15 at Exh.72; (16) Employee of Pravasi

Gruh run by Baroda Municipal Corporation Mr.A.B.Purohit as P.W.-16 eat Exh.75; (17) Police Constable Ratilal Jagabhai as P.W.-17 at Exh.80; (18) Police Constable Karshanbhai Ratanjibhai as P.W.-18 at Ex.82; (19) Crime Write Head Pandurang Omkar Thakre as P.W.-19 at Exh.87; (20) Police Constable Viththalbhai Dahyabhai as P.W.-20 at Exh.92; (21) Unarmed Head Constable Prabhaker Laxmanbhai as P.W.-21 at Exh.93; (22) A.S.I. Shrikantbhai Vijaybhai Valivi as P.W.-22 at Exh.99; (23) Police Constable Arvindbhai Bhagwanbhai as P.W.-23 at Exh.101; (24) Police Inspector Dawoodbhai Adambhai Patel as P.W.-24 at Exh.105; (25) Police Inspector Kiritsinh Surubha Jhala as P.W.-25 at Exh.121; (26) Police Inspector Jashvetdarsinh Dharmasinh Ramgadhiya as P.W.-26 at Exh.133; (27) Police Inspector Mansukhbhai Balubhai Tarbada as P.W.-27 at Exh.157; and (28) Investigating Officer Naransinh Ganpatsinh Dodiya as P.W.-28 at Exh.160. The prosecution also produced documentary evidence such as *muddamal* slips bearing signatures of panch witnesses and Police Officers at Exh.24 to 31; panchnama indicating that *muddamal* seized was analyzed by expert of F.S.L. at Police Station at Exh.34; different slips bearing signatures of panch witnesses at Exhs.35 to 38; report by PSI Mr.Dodiya, “A” Division Police Station to learned chief Judicial Magistrate, Bharuch, dated March 10, 1998 at Exh.43;

resolution prepared before searching house of the appellant No.2 situated at Pratapgadh at Exh.44; panchnama indicating compliance of Section 50 of the Act before search of house of the appellant No.2 at Exh.45; panchnama of search of house of the appellant No.1 at Exh.47; resolution prepared under Section 42 of the Act relating the appellant No.4 at Exh.48; panchnama of search of house of the appellant No.4 at Exh.49; panchnamas of house of the appellant No.2 at Exh.52 and 55; extracts of register of Guest House and Rambharose Hindu Hotel as well as Mayank Hotel at Exhs.68 and 73, etc.; record prepared by Junior Clerk of Pravasi Gruh that Room No.2 was rented to the appellant No.3 of Bombay on March 8, 1998, who had gone away after applying his own lock on the room and not returned till March 16, 1998 as a result of which lock was broken open and articles mentioned therein were found at Exh.79; copy of the sealed cover which Ratilal had handed over to in charge Jamadar Abbasbhai at the instance of PI Mr.Jhala at Exh.81; intimation by PI Mr.Jhala to P.S.O. to register offence against the appellant No.3 and others under Section 21 read with 29 of the Act and asking him to hand over the investigation to PSI Mr.Dodiya at Exh.94; *verdhi* indicating that information was conveyed to Gayatriben about arrest of her husband Rameshbhai Dhobi at Exh.96; receipt by F.S.L. for having received

muddamal at Exh.100; complaint of PI Mr.D.A.Patel at Exh.106; panchnama of search of persons of Mohmed Iqbal Chhipa, Pappu Dhobi, Bhaskar Anna, Ramesh Dhobi and find and seizure of brown sugar from Mohmed Iqbal, Pappu Mohanlalji Dhobi, Bhasker Gangarajen, etc. at Exh.123; entry from Police Station Diary at Exh.124; report under Section 42(2) by PI Mr.Jhala to D.S.P. Bharuch at Exh.125; record indicating that information received was reduced into writing at Exh.126; resolution prepared by Mr.Jhala before effecting search of the accused at Exh.127; entry indicating that the expert of F.S.L. was summoned at Police Station to analyze the substance found at Exh.128; intimation by PI Mr.Ramgadhiya to PI "A" Division to maintain watch in view of the information received at Exh.134; application dated March 10, 1998 made by Mr.Dodiya to Chief Judicial Magistrate, Bharuch, to permit him to keep custody of *muddamal* at Exh.163; preliminary opinion given by expert of F.S.L. that substance analyzed was brown sugar at Exh.164; report about search, seizure and arrest of the accused to Sub Division Magistrate at Exh.165; report of analysis at Exh.167; forwarding letter with which *muddamal* was sent to F.S.L. at Exh.171; etc. in support of its case against the appellants and others.

5. After recording of evidence of the prosecution

witnesses was over, the learned Judge explained to the appellants and others the circumstances appearing against them in the evidence of prosecution witnesses and recorded their further statements as required by Section 313 of the Code of Criminal Procedure, 1973. In their further statements, the appellants claimed that they were innocent. The appellant No.2 filed his written statement at Exh.181 whereas the appellant No.3 filed his written statement at Exh.182 and the appellant No.4 filed his written statement at Exh.183 whereas the appellant No.5 filed his written statement at Exh.184. No defence evidence was adduced by any of the appellants.

6. On appreciation of evidence adduced by the prosecution, the learned Judge of the trial Court held that it was not proved by the prosecution that the original accused No.6, i.e. Meerbazkhan Iradkhan Pathan, and the original accused No.7, i.e. Chandu @ Chandrashekhar Dharamchand Bhatevara, were party to criminal conspiracy hatched by the appellants and were entitled to be acquitted. The learned Judge deduced that it was proved by the prosecution that that the appellant Nos.1 to 3 were found in possession of the brown sugar without pass or permit in pursuance of conspiracy entered into with the appellant Nos.4 and 5. In view of abovereferredto conclusions, the learned Judge has

acquitted the original accused Nos.6 and 7, but convicted the appellants under Section 21 read with Section 29 of the Act and imposed sentence referred to earlier by judgment dated January 10, 2002, giving rise to instant appeal.

7. This Court has heard Mr.M.J.Budhdhbhatti, learned counsel of the appellants, and Mr.N.D.Gohil, learned Additional Public Prosecutor for the State, at length and in great detail for three days. This Court has also undertaken a complete and comprehensive appreciation of all vital features of the case and the entire evidence on record with reference to broad and reasonable probabilities of the case.

8. The contention that the story of the prosecution is unnatural and, therefore, the appellants should be acquitted, has no substance. The learned counsel of the appellants could not pinpoint as to which part of the prosecution story is unnatural. The prosecution case is that Mr.Ramgadhiya, who was PI of Unit No.IV, A.T.S., Ahmedabad, had received secret information that the appellant Nos.1 to 4 were to deliver brown sugar to the appellant No.5, pursuant to which the raid was carried out and from the possession of the appellant Nos.1, 2 and 3 brown sugar, in fact, was seized. If Mr.Ramgadhiya had not received information as claimed by him, he would not

have made report to his immediate official superior Mr.Shaikiya nor informed Mr.Jhala, who was then PI of “A” Division Police Station, Bharuch, nor would have gone to Bharuch nor maintained a vigil at the place which was mentioned in the secret information. It is relevant to notice that the procedure of seizure and weighing was carried out in Sheetal Guest House, which was photographed. Those photographs are produced on record by the prosecution at Exh.61. Under the circumstances, this Court fails to understand as to how the story of the prosecution can be termed as unnatural. The story of the prosecution is probable and is rightly believed by the learned Judge of the trial Court who had advantage of observing demeanour of the witnesses. Therefore, no benefit can be granted to any of the appellants on the specious plea that story of the prosecution is unnatural.

9. The contention that no independent witnesses have supported the prosecution case and, therefore, the case based on the evidence of the Police Officers should not have been accepted by the trial Court, is merely stated to be rejected. In **Vahaji Ravaji Thakore & Anr. vs. State of Gujarat, 2003(3) G.L.H. 283,** this question has been discussed in detail. After referring to the decisions of the Supreme Court on the point, the Division Bench of this Court has held as under:

> *"Merely because the panch witnesses do not support the case of the prosecution, the case of the prosecution need not be thrown over broad as unreliable. It must be realised that the phenomenon of panch witnesses turning hostile to the prosecution is not unknown and is ever on the increase. It needs hardly to be emphasized that the decision of a case does not depend solely on the question whether the panch witnesses support the prosecution or turn their back on it. If the decision of the case were to depend solely on the testimony of panch witnesses regardless of the evidence of independent witnesses, in theory, it would be giving a right of veto to the panchas so far as that question of culpability of an accused is concerned. If the evidence of Police Officer is otherwise found to be true and dependable, judicial pragmatism requires that merely because the panchas do not support, it should not be made a ground to discard his evidence."*

Applying the principle laid down in the above-quoted decision to the facts of this case, this Court finds that all the Police Officers have deposed before the Court consistently. The Police Officers were discharging their official duties. It could not be pointed out by the defence that any of the Police Officers was on inimical terms with any of the appellants. The claim advanced by the Police Officers before the Court gets ample corroboration from the contemporary documents, which were prepared at the relevant time and produced on record of the case. Though all the Police Officers have been subjected to gruelling cross-examination, nothing could be elicited so as impeach their credibility. On reading the evidence

tendered by the Police Officers, it becomes, at once, clear that the Police Officers are witnesses of truth. Therefore, their evidence cannot be disbelieved or discarded merely because panch witnesses have not supported the prosecution. The plea that the panch witnesses have not supported the prosecution case and the Police Officers are interested witnesses as a result of which, the appellants should be acquitted, is devoid of merits, and is hereby rejected.

10. The plea that no report was made to higher official superior as required by Section 42(2) of the Act and, therefore, the appellants should be acquitted, is also merely stated to be rejected. The record of the case shows that the raid was carried out in an open place. It is nobody's case that the raid was carried out in a building, a conveyance or an enclosed place. Under the circumstances, the provisions of Section 42(2) of the Act would not be applicable to the facts of the case. This is in view of the decisions of the Supreme Court case in (1) **Krishna Kanwar vs. State of Rajsthan, (2004) 2 SCC 608;** (2) **Rajendra & Another vs. State of M.P. (2004) 1 SCC 432;** and (3) **State of Hariyana vs. Jarnail Singh, (2004) 5 SCC 188.** In view of the authoritative pronouncements of law on the point, no benefit can be accorded to the appellants on the ground that the report

under Section 42(2) of the Act was not forwarded by the raiding officer to his immediate official superior.

11. The plea that the provisions of Section 50 of the Act are not complied with and, therefore, the appellants should be acquitted, has no substance at all. The record shows that before effecting search of persons of the appellants, they were offered to be searched in presence of a gazetted officer or a magistrate, but the said offer was declined by the appellants. It may be stated that as far as the appellant No.1 is concerned, the bag carried by him was searched and, therefore, the provisions of Section 50 of the Act would not be applicable. Further, before searching his person as well as persons of other appellants, offer as contemplated by Section 50 of the Act was made. This is quite evident if one peruses the testimonies of the Police Officers examined in the case. The assertion made by the three PIs on oath before the Court that the offer as contemplated under Section 50 of the Act was made and that offer was declined by the appellants, could not be demonstrated to be false. The fact that the offer as contemplated by Section 50 of the Act was made, is mentioned in the panchnama which was drawn at Sheetal Guest House itself. Further, the fact that the offer that the appellants could be searched in presence of a gazetted officer or a

magistrate if so desired was made and that the said offer was declined, is also mentioned in the complaint itself, which was reduced into writing by Mr.Patel at Sheetal Guest House. The reliable testimony on record establishes that Section 50 of the Act was fully complied with. The finding recorded by the learned Judge of the trial Court to the effect that evidence on record clearly establishes that Section 50 of the Act was complied with, could not be demonstrated to be erroneous. As the evidence on record satisfactorily establishes that the provisions of Section 50 of the Act were complied with before effecting search of persons of the appellants, the appellants are not entitled to get any benefit of doubt on the ground that mandatory provisions of Section 50 of the Act, were not complied with.

12. The argument that the Police Officer in charge of “A” Division Police Station, Bharuch, did not apply second seal on the samples as required by Section 55 of the Act and, therefore, the appellants should be acquitted, is devoid of merits. The plea that over and above sealing of *muddamal* at the time of seizure, the *muddamal* should also be sealed by the Police Officer in charge of Police Station when it is handed over to him for safe custody, has been advanced by the learned counsel of the appellants on the basis of unreported

decision dated December 4, 2004 rendered by the Division Bench comprising D.K.Trivedi & S.R.Brahmbhatt, JJ., in Criminal Appeal No.940 of 1999, which was filed by *Vishnupuri Gurumahani Puri @ Vichitrakumar Vrundavan* against *State of Gujarat.* In paragraphs 20 to 22 of the unreported decision, the Division Bench has held as under:

> *"20. Ms.Acharya, the learned advocate for the appellant, as observed earlier, has placed reliance upon the decision of the Supreme Court in the matter of Gurbax Singh v. State of Haryana, reported in (2001) 3 SCC 28, dealing with the provisions of Section 55 of the NDPS Act, as according to her that first both the Panchas have not supported the prosecution and recovery of muddamal at the instance of the accused is not supported through independent witnesses. Section 55 of the NDPS Act, which reads as under:-*
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> *"55. Police to take charge of articles seized and delivered.- An officer-in-charge of a police station shall take charge of and keep in safe custody, pending the orders of the Magistrate, all articles seized under this Act within the local area of that police station and which may be delivered to him, and shall allow any officer who may accompany such articles to the police station or who may be deputed for the purpose, to affix his seal to such articles or to take samples of and from them and all samples so taken shall also be sealed with a seal of the officer-in-charge of the police station."*
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> *21. According to Ms.Acharya that in the present case after the muddamal was seized and taken to the police station there is no seal of the PSO of the police station and further that even the prosecution has not led any evidence in respect of the handling of the muddamal till the muddamal was handed over to the F.S.L. As found, the prosecution has not examined the Crime Writer Dipsinh who had received the muddamal handed over by P.I.Vaghela in the Police Station. While*

referring to the decision of the Apex Court in the matter of Gurbax Singh v. State of Haryana (Supra), the Supreme Court has in paragraph 9 observed, which reads as under:-

"9. The learned counsel for the appellant next contended that from the evidence it is apparent that the IO has not followed the procedure prescribed under Sections 52, 55 and 57 of the NDPS Act. May be that the IO had no knowledge about the operation of the NDPS Act on the date of the incident as he recorded the FIR under Sections 9/1/78 of the Opium Act. In our view, there is much substance in this submission. It is true that provisions of Sections 52 and 57 are directory. Violation of these provisions would not ipso facto violate the trial or conviction. However, IO cannot totally ignore these provisions and such failure will have a bearing on appreciation of evidence regarding arrest of the accused or seizure of the article. In the present case, IO has admitted that seal which was affixed on the muddamal article was handed over to the witness PW 1 and was kept with him for 10 days. He has also admitted that the muddamal parcels were not sealed by the officer in charge of the police station as required under Section 55 of the NDPS Act. The prosecution has not led any evidence whether the chemical analyzer received the sample with proper intact seals. It creates a doubt whether the same samples were sent to the chemical analyzer. Further, it is apparent that the IO has not followed the procedure prescribed under Section 57 of the NDPS Act of making full report of all particulars of arrest and seizure to his immediate superior officer. The conduct of panch witness is unusual as he offered himself to be a witness for search and seizure despite being not asked by the IO, particularly when he did not know that the substance was poppy husk, but came to know about it only after being informed by the police. Further, it is the say of the Panch witness that muddamal seal used by the PSI was a wooden seal. As against this, it is the say of PW 2 SI/IO that it was a brass seal. On the basis of the aforesaid evidence and faulty investigation by the prosecution, in our view, it would not be safe to convict the appellant for a serious offence of possessing poppy husk."

22. While considering the submission and non examination of Dipsinh as contended

by Ms.Acharya, as found from the record, the P.P. incharge of the case has submitted a closing Purshish which is at Exh.42. As found from the said Purshish Exh.42 that the Crime Writer Head Constable Dipsing is since last 2 to 3 months not in a position to move out and the accused is in jail and the witnesses are known and Abdulbhai was examined by the prosecution and as Singh is functioning as D.S.P. in Mehsana and his personal case is also pending for which he is also not mentally fit and through-out the raid the said officer had remained and signed the documents and these documents are already exhibited and the report submitted to the superior officer in which Singh has not signed, the prosecution is not intending to examine any further witness. This Purshish was given on 6.7.1999. It is true that Dipsinh Head Constable, who had received the muddamal from P.I. Vaghela, is not examined. However, as observed and as discussed the evidence of P.W.5 Gambhirbhai in which it is clear that he was working as PSO at Gomatipur Police Station and he has registered the offence on the strength of the complaint received along with the report under Section 157 of the Cr.P.C. and further as found from his evidence in cross examination about the muddamal according to him that if the offence is pertaining to Police Station then that muddamal is entrusted to the P.S.O. However, in some important cases the muddamal can remain with the P.I. As found from the evidence of P.I. Vaghela, who had in term deposed that the muddamal in question was sealed at the place where the accused was apprehended and in sealed condition the muddamal was entrusted to Dipsinh and as discussed the evidence of an officer, who had taken the muddamal by making entry in the Register and the said muddamal was handed over by that officer before the F.S.L. and the Assistant Director of FSL had in term acknowledged the letter issued by the police dated 17.1.1998 and the muddamal packets were received in sealed cover through Head Constable Bhalabhai Punjabhai. Even as found from the evidence of Bhalabhai that when he received the muddamal, the muddamal was in sealed condition."

12.1 On reading the unreported judgment, it becomes

evident that at one stage it is observed by the Division Bench that the sealed *muddamal* was not sealed by the Police Officer in charge of Police Station at the time of handing over *muddamal.* At this stage, it would be relevant to notice Section 55 of the Act, which reads as under:

> *"55. Police to take charge of articles seized and delivered.- An officer-in-charge of a police station shall take charge of and keep in safe custody, pending the orders of the Magistrate, all articles seized under this Act within the local area of that police station and which may be delivered to him, and shall allow any officer who may accompany such articles to the police station or who may be deputed for the purpose, to affix his seal to such articles or to take samples of and from them and all samples so taken shall also be sealed with a seal of the officer-in-charge of the police station."*

12.2 On analysis of Section quoted above, it becomes evident that Section 55 of the Act deals with procedure to be followed by an officer in charge of Police Station on seizure of any article under the provisions of the said Act. A duty is cast on an Officer-in-Charge of Police Station to take charge and keep in safe custody all articles which may be- (a) seized under this Act within the local area of that police station, and (b) delivered to him, pending the orders of the Magistrate. Any officer who- (a) accompanies the articles seized to the police station, or (b) is deputed for the purpose has

a right (i) to affix his seal to the articles seized, or (ii) to take samples of and from the articles seized, and at that time, the samples so taken have to be sealed with a seal of officer in charge of the Police Station. Therefore, the contention that on receipt of *muddamal* itself, the Police Officer in charge of the Police Station must apply his seal, runs contrary to the scheme of Section 55 of the Act. The mandate of Section 55 of the Act is that the Officer-in-Charge of the Police Station is compulsorily directed to allow another officer to fix his seal on such articles, who brings the same to the Police Station. The Officer-in-Charge of the Police Station is also duty bound to allow such officer to take samples and when the samples are taken, it is his duty to apply his seal also.

12.3 This question has been considered by the Division Bench of this Court in **Bherulal Viraji Kumavat vs. State of Gujarat, 1999(1) G.L.H. 264.** The Division Bench, after examining the scheme of Section 55 of the Act, has held as under in paragraph 25 of the reported decision.

> *"25. It was canvassed before us, on behalf of the accused that the provisions of Section 55 of the NDPS Act were not observed, in view of the evidence on record. We are sorry to say that this submission is also, factually, wrong and incorrect. It is very clear from the evidence of P.I. and other concerned Police Officers that the samples of muddamal Charas had been sent to*

the Forensic Science Laboratory and also to the Officer-in-charge of Police Station, after affixing the required seal to such articles. This is also very apparent from the evidence of the Panch witness. The contention that two seals were not affixed in terms of the provisions of Section 55 is also not correct and proper in the light of the facts of the present case. The question of affixation of two seals, as mandated by the provisions of Section 55, will be necessary to be applied only when the seized articles or the samples of the contraband articles are collected and sent to a Police Station by officer of a department, other than the one the Authorized Officer comes from. The Officer-in-Charge of Police Station is obliged to take the charge of and keep in safe custody all articles seized under the NDPS Act, pending the orders of the Magistrate, within the local area of that Police Station and which may be delivered to him and shall allow any officer who may accompany such articles to the Police Station to affix his seal to such articles or to take samples of and from them, and all samples taken from such articles shall also be sealed with the seal of the officer-in-charge of the Police Station. The factual scenario emerging from the record of the present case does not warrant affixation of two seals as, while making the Panchnama after necessary procedure had been followed, the Police Inspector had put his own seal and it was sent to his own Police Station, at Maninagar. The question of affixation of two seals on a seized muddamal article would arise only in the event of the Investigating Officer happens to be an officer of the Police Station other than where the seized articles are sent. In the present case, P.I. Mr.Malek, who affixed his seal, i.e. the seal of Maninagar Police Station, did not require to affix the seal again while placing in the safe custody of the same articles in same Police Station. Therefore, in our opinion, contentions No.V, VI, and VII are also misconceived."

12.4 A bare reading of the above quoted decision makes it very clear that the affixation of two seals is not a must and would depend upon the facts of each case.

According to the Division Bench, the question of affixation of two seals as mandated by the provisions of Section 55 will be necessary only when the seized articles or samples are collected and sent to a Police Station by Officer of a Department other than the one authorized officer. According to the Division Bench, the Officer in charge of Police Station is obliged to take the charge of and keep in safe custody all articles seized under the NDPS Act pending the orders of the Magistrate within the local area of that Police Station and which may be delivered to him and shall allow any officer who may accompany such articles to the Police Station to affix his seal to such articles or to take samples of and from them and all samples taken from such articles shall also be sealed with the seal of the officer in charge of the Police Station.

12.5 This Court finds that the reported judgment rendered by the Division Bench in case of **Bherulal V. Kumavat (supra)** was not noticed by the Division Bench which decided Criminal Appeal No.940 of 1999 on December 4, 2004 and, therefore, the observations made in decision rendered in Criminal Appeal No.940 of 1999 on December 4, 2004 will have to be regarded as *per incuriam.* Accordingly, it is held that the part of decision rendered on December 4, 2004 in Criminal Appeal No.940 of

1999 holding that P.S.O. should also apply his seal on production of muddamal before him does not lay down binding precedent, and is *per incuriam.* The decision relied upon by the learned counsel of the appellants does not help the appellants because it is nobody's case that after *muddamal* was handed over to the Police Officer in charge of "A" Division Police Station, it was insisted by any of the Police Officers to affix his seal or that samples were taken from the *muddamal.* The record unerringly establishes that the *muddamal* handed over was kept in safe custody by the Police Officer in charge till it was dispatched to F.S.L. for analysis.

12.6 In **Saikou Jabbi vs. State of Maharashtra, (2004) 2 SCC 186,** the plea based on breach of Section 55 of the Act was negatived by the Supreme Court in following terms:

> *"Coming to the plea regarding non-compliance with Section 55 of the Act, as rightly submitted by the learned counsel for the respondent State, there was not even any argument advanced on that score before the trial Court and the High Court. Even otherwise also the evidence of the investigating officer about safe custody of the contraband articles has not been challenged or shaken in the cross-examination. That being the position, we are not inclined to accept the plea that there was non-compliance with the requirement of Section 55 of the Act."*

12.7 On overall view of the matter, this Court is of the firm opinion that there is no breach of Section 55

of the Act and, therefore, no benefit can be accorded to any of the appellants.

13. The contention that the report contemplated under Section 57 of the Act was not forwarded to the immediate official superior *"within forty-eight hours"* and, therefore, the prosecution should be held to have been vitiated, has no merits. On detailed discussion of evidence on record, the learned Judge of the trial Court has come to the conclusion that the provisions of Section 57 of the Act, which are directory in nature, were complied with. The record indicates that the complaint was lodged in this by PI Mr.Patel at about 3.30 AM on March 10, 1998 whereas the report as contemplated under Section 57 of th Act, which is produced at Exh.172, was also forwarded on that very day. Under the circumstances, it is difficult for this Court to agree with the submission that the report was not sent within forty-eight hours as contemplated by Section 57 of the Act. On the facts and in the circumstances of the case, the plea based on breach of Section 57 of the Act is found to be devoid of merits and is hereby rejected.

14. It was faintly argued by Mr.Budhdhbhatti, learned counsel of the appellants, that the report of the analysis produced by the prosecution at Exh.167 does not

establish that the substance analyzed was brown sugar and, therefore, the appellants should be acquitted. However, it was pointed out that the report forming part of the paper-book is not complete and Page 3, which is continuing one, is not on the record of the case. This Court had perused the original record wherein also Page 3 of the report was found to be missing. However, a detailed reference to the contents of the report is made by the learned Judge of the trial Court including the result of analysis and ingredients found during the course of analysis. Those ingredients could not have been mentioned by the learned Judge in the impugned judgment unless the full report was produced before the trial Court. The learned counsel of the appellants could not demonstrate before this Court that the ingredients noticed by the learned Judge of the trial Court in analysis report and reproduction of the same in the judgment is incorrect. Realizing this difficulty, the learned counsel of the appellants has not pressed this argument at all.

15. The argument that so far as the appellant Nos.4 and 5 are concerned, nothing incriminating was found from their possession and as the prosecution has failed to establish criminal conspiracy contemplated by Section 120A IPC and Section 29 of the Act, those appellants

should be given benefit of doubt, deserves serious consideration. From the record of the case, it is evident that according to the prosecution case, a criminal conspiracy was hatched between the appellants and acquitted accused No.6 and as per that conspiracy, the appellant No.2 was to collect quantity of brown sugar from the accused No.6, who was staying at Rajsthan, and was to hand over the same to the original accused No.7. It is also the case of the prosecution that thereafter, the appellant No.7 was to bring the quantity of brown sugar in his car at Baroda whereas No.2 had to travel from Rajsthan to Baroda and after collecting the quantity of brown sugar from original accused No.7 at Baroda, the appellant No.2 was to hand over the quantity of brown sugar to the appellant Nos.1, 3 and 4 also. It is further the case of the prosecution that the appellant Nos.1 to 4 were thereafter to hand over quantity of brown sugar to the appellant No.5, who was to take the same to Bombay. However, as observed earlier, the learned Judge of the trial Court has acquitted the original accused Nos.6 and 7. The acquittal of the original accused Nos.6 and 7 is accepted by the State Government and is not subject matter of challenge before this Court in a separate appeal. It means that it could not be proved by the prosecution that in furtherance of criminal conspiracy, the appellant No.2 had collected quantity of brown sugar

from original accused No.6 or that thereafter, he had handed over brown sugar to the original accused No.7 or that original accused no.7 had brought brown sugar in his car to Baroda or that at Baroda the appellant No.2 had taken delivery of brown sugar from the original accused No.7. Further, as per the case of the prosecution, the appellant No.2 was also to hand over the quantity of brown sugar to the appellant Nos.1, 3 & 4. However, admittedly, nothing incriminating was found from the possession of the appellant No.4. It was also the case of the prosecution that the appellant Nos.1 to 4 were to hand over quantity of brown sugar to the appellant No.5. However, the evidence on record does not indicate that though the appellant No.5 had shaken the hands with the appellant Nos.1 to 4, the appellant Nos.1 to 4 had handed over any quantity of brown sugar to the appellant No.5. Except the fact that all the appellants were sighted together, no other incriminating circumstance is established to prove charge of conspiracy.

15.1 Criminal conspiracy contemplated by Section 120A IPC and Section 29 of the Act must be proved by the prosecution as laid down by the Supreme Court in **Yash Pal Mital vs. The State of Punjab, A.I.R. 1977 SC 2433.** The prosecution has not adduced any evidence to establish criminal conspiracy between the appellant Nos.1 to 3,

who were found in possession of brown sugar, and the appellant Nos.4 & 5 from whom nothing incriminating was found. Therefore, the appellant Nos. 4 and 5 would be entitled to reasonable benefit of doubt though they were found in the company of the appellant Nos.1 to 3 when offending substance was found from their possession.

15.2 However, there is no manner of doubt that the appellant Nos.1 to 3 were found in possession of brown sugar contrary to the provisions of the Act. The fact that they were found in possession of the brown sugar stands firmly established by the reliable testimony of the Police Officers, who are supported by contemporary documents on record. As observed earlier, the evidence of the Police Officers is reliable and cogent. Merely because they are Police Officers, their evidence cannot be rejected. As their evidence is found to be trustworthy and inspiring the confidence, this Court is of the opinion that the learned Judge of the trial Court was justified in acting on their evidence to fasten criminal liability on the appellant Nos.1 to 3. As the appellant Nos.1 to 3 were found in possession of the brown sugar, their conviction under Section 21 read with Section 29 of the Act will have to be upheld, and is hereby upheld.

16. The contention that the sentence imposed on the

appellant Nos.1 to 3 is very harsh and, therefore, should be suitably reduced by this Court, is also stated to be rejected. In **Union of India vs. Kuldeep Singh, A.I.R. 2004 SC 827,** the Supreme Court has made following pertinent observations in paragraphs 14 to 17 of the reported decision regarding imposition of sentence in cases arising under the provisions of the Act.

> *"14. Imposition of sentence without considering its effect on the social order in many cases may be in reality a futile exercise. The social impact of the crime, e.g. where it relates to offences relating to narcotic drugs or psychotropic substances which have great impact not only on the health fabric but also on the social order and public interest, cannot be lost sight of and per se require exemplary treatment. Any liberal attitude by imposing meager sentence or taking too sympathetic view merely on account of lapse of time or personal inconveniences in respect of such offences will be result-wise counter productive in the long run and against societal interest which needs to be cared for and strengthened by string of deterrence inbuilt in the sentencing system.*
>
> *15. In Dhananjoy Chatterjee v. State of W.B. (1994) (2) SCC 220), this Court has observed that shockingly large number of criminals go unpunished thereby increasingly, encouraging the criminals and in the ultimate making injustice suffer by weakening the system's creditability. The imposition of appropriate punishment is the manner in which the Court responds to the society's cry for justice against the criminal. Justice demands that Courts should impose punishment befitting the crime so that the Courts reflect public abhorrence of the crime. The Court must not only keep in view the rights of the criminal but also the rights of the victim of the crime and the society at large while considering the imposition of appropriate punishment.*
>
> *16. Similar view has also been expressed in Ravji v. State of Rajsthan (1996(2) SCC 175). It has been held in the said case that it is the*

nature and gravity of the crime but not the criminal, which are germane for consideration of appropriate punishment in a criminal trial. The Court will be failing in its duty if appropriate punishment is not awarded for a crime which has been committed not only against the individual victim but also against the society to which the criminal and victim belong. The punishment to be awarded for a crime must not be irrelevant but it should conform to and be consistent with the atrocity and brutality with which the crime has been perpetrated, the enormity of the crime warranting public abhorrence and it should "respondent to the society's cry for justice against the criminal".

17. An offence relating to narcotic drugs or psychotropic substance is more heinous than a culpable homicide because the latter affects only an individual while the former affects and leaves its deleterious impact on the society, besides shattering the economy of the nation as well. That the legislature intended to make the offences under the Act so serious to be dealt with sternly and with an iron hand is made clear by providing for enhanced penalties, including even death sentence, in certain class of cases, when convicted for the second time."

16.1 Applying the principles laid down by the Supreme Court in above-quoted decision to the facts of this case, this Court finds that large quantity of brown sugar, which is extremely injurious to the health, was found from the possession of the appellant Nos.1, 2 and 3 and, therefore, no case for reduction of sentence is made out at all.

17. For the foregoing reasons, the appeal partly succeeds. The conviction of the appellant Nos.4 and 5 recorded by the learned Special Judge & Additional

Sessions Judge, Bharuch, vide judgment dated January 10, 2002 rendered in Special N.D.P.S. Case No.6 of 1998, under Section 21 read with Section 29 of the Act, and imposition of R.I. for fifteen years and fine of Rs.1 Lac, in default R.I. for one year on each of them, is hereby set aside. Instead, they are acquitted. The respondent is directed to release them from the Jail forthwith unless presence of both or any of them in the Jail is needed with reference to any other case.

As far as the appellant Nos.1 to 3 are concerned, their appeal fails, and is dismissed. Their conviction under Section 21 read with Section 29 of the Act, and imposition of sentence of R.I. for fifteen years and fine of Rs.1 Lac, in default R.I. for one year, on each of them vide judgment dated January 10, 2002 rendered by the learned Special Judge & Additional Sessions Judge, Bharuch, in Special N.D.P.S. Case No.6 of 1998 is hereby confirmed. Muddamal to be disposed of in terms of the directions given by the learned Judge of the trial Court in the impugned judgment. Direct Service is permitted.

[J.M.PANCHAL, J.]

[H.B.ANTANI, J.]

Rajendra